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Record not printed
No 682

Supreme Court of the United States,

OCTOBER TERM, 1876.

WILLIAM W. BOYD, JR., PLAINTIFF IN ERROR,

No. 682.] *vs.*

THE STATE OF ALABAMA, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF ALABAMA.

BRIEF OF SAMUEL F. RICE,

ATTORNEY OF PLAINTIFF IN ERROR

On Motion of Defendant in Error to Dismiss for want of Jurisdiction, or to Affirm under amended Rule 6; and, also, on the Merits of the Case.

BARRETT & BROWN, PRINTERS.

April 28 1877
Affirmed

Record not printed
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Supreme Court of the United States,

OCTOBER TERM, 1876.

WILLIAM W. BOYD, JR., PLAINTIFF IN ERROR,

No. 682. } *vs.*

THE STATE OF ALABAMA, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF ALABAMA.

STATEMENT OF THE CASE.

At the June term, 1875, of the City Court of Mobile, an indictment was returned into court against the plaintiff in error, charging that, before the finding thereof, he "set up or was concerned in setting up or carrying on a lottery, without the legislative authority of this State—against the peace and dignity of the State of Alabama."

He pleaded not guilty, and on this issue a trial by jury was had.

The evidence introduced was an agreed statement of facts, as follows:

"In this case it is agreed between the State of Alabama on the one part, and the defendant, W. W. Boyd, Jr., of the other part, that the facts are as follows, to-wit: The defendant, who represents the firm of Boyd, Jackson & Co., named in the act of the 10th of October, 1868, and found in the published acts of 1868, page 263, and named individually in said act, as grantees of the franchise therein and thereby created, admits that he was engaged in setting up and carrying on a lottery in the City of Mobile, within

twelve months before the finding of the indictment, in pursuance of, and according to, and under the license granted by the legislature of the State of Alabama, as shown in the act of the State of Alabama above referred to, entitled "An act to establish a Mutual Aid Association, and to raise funds for the common school system of Alabama;" and in no other manner.

"The State, on the one hand, admits that the acts of the defendant charged in the indictment to constitute the crime in this case, were done under and according to the license of the act above referred to, and would be legal if said original grant is not unconstitutional, and if the original grant in the act of October 10th, 1868, is not repealed by the subsequent act of the Legislature of the State of Alabama, passed the 8th day of March, 1871, and found in the published acts of 1871, page 217.

The State also admits that the defendant and those representing his firm and the Mutual Aid Association, paid into the treasury of the State of Alabama, on the first day of November 1874, two thousand dollars, according to the requirements of the 4th section of the said act of the 10th of October 1868; that the treasurer of the State of Alabama received the money and issued his receipt therefor, as paid under and according to the said fourth section of the said act; the said 1st day of November being the day on which the first payment was made to the treasurer under said act, and that being the day when all subsequent payments fell due to the treasury. The State further admits, that on the first day of November, 1868, the sum of two thousand dollars was paid into the treasury of the State of Alabama under said act by Boyd, Jackson & Co., and the like sum of two thousand dollars has annually been paid into the treasury of the State of Alabama, by said firm or its reprsentatives, under said act each year from the 1st day of November, 1868, up to the first day of November 1872, when the said sum was tendered to be paid as aforesaid, but the said money was then refused, on the ground

that the said act of the 10th of October 1868, had been repealed by the said act of the 8th March of 1871. The tender was also made in like manner on the first day of November 1873, with the like refusal, but the money was received, as above stated, on the first of November 1874.

"The State further admits that the grantees of the said franchise commenced business under the said act or grant, immediately after the first payment made unto the treasury of the State of Alabama, and have been doing business ever since, under the said act. It is futher admitted by the State that the case of Brent vs. The State, reported in 43d Alabama Reports, page 297, the case of Boyd & Jackson vs. The State, reported in the 46th volume Alabama Reports, page 329, and the case of W. W. Boyd, Jr., vs. The State, still in manuscript and not yet reported, are all indictments under the act of October the 10th, 1868, and all involve the construction of the said act, and the above named cases, so far as reported, may be referred to as part of the evidence in the case for what they may be worth, and also the record and opinion of the Supreme Court in the last named case may be referred to, either as argument or evidence for the same purpose.

"These admissions by the State, however, are made with this qualification, viz: That the acts done by the defendant, consisted in carrying on a lottery, in and by which the awards and prizes were distributed and ascertained by lot or chance, and were paid in currency, but it is not admitted by the State that any book, painting, work of art, scientific instrument or apparatus, lands, tenements, stock or any other valuable thing whatever, than money or currency, was ever at any time distributed as awards or prizes by the defendants under said act of assembly, within twelve months previous to the finding of the indictment; nor is it admitted by the State that the defendant offered any premium or prizes to the citizens of Alabama, or any of them, for the best essays in science and art, for the most deserving works of art, or the most useful inventions in

mechanical science; nor is it admitted by the State, that before the distributions, or either of them, of awards and prizes, were or was made, a list of the articles to be distributed, with the value of each article annexed, was advertised by defendant, except the prizes in currency or money. It is agreed that the judge may charge the law to the jury on the facts above stated."

Under and in pursuance of the foregoing agreement, the defendant introduced in evidence the record of case of the State of Alabama vs. W. W. Boyd, Jr., the present plaintiff in error, together with the admitted facts introduced in evidence on that trial, and a copy of the opinion of the Supreme Court of Alabama rendered thereon.

The record thus introduced, showed an indictment, like the indictment in the present case, found against the plaintiff in error at the June term, 1873, of the city court of Mobile, for setting up and carrying on a lottery, &c., an agreed statement of facts admitted by the State and the defendant, which in its material particulars is identical with the foregoing agreed statement of facts; a conviction, and an appeal to the Supreme Court of Alabama; and its judgment of reversal and discharge, and the opinion thereon, at its January term, 1874.

This opinion decides that the original act of October 10, 1868, was a valid and binding contract; that the repealing act was void, and that upon the agreed facts, there could be no conviction, wherefore the defendant was discharged from further prosecution.

The foregoing was, in substance, all the evidence in the present case, and upon the foregoing evidence the court charged the jury, "that upon the agreed statement of facts and the evidence in the cause, the defendant is guilty in manner and form as charged in the indictment." To which charge the defendant (present plaintiff in error) duly excepted.

"Thereupon the defendant (now plaintiff in error) requested in writing the following charges from the court, to-wit:

"The facts being admitted that the defendant in this case has been heretofore, and before the finding of this indictment, arraigned and acquitted in this court, upon an indictment for setting up or carrying on a lottery, without the legislative authority of this State, and that the defense under that indictment was the act of October 10th, 1868, under which defendant claimed that he had legislative authority to set up and carry on a lottery, notwithstanding the subsequent act of the legislature, approved 8th day of March, 1871, which was intended to repeal the said first act of October 10, 1868, and it being further admitted that under and in accordance with the said last mentioned act, the defendant has fully paid into the treasury of the State the sum of two thousand dollars, and that all the acts done by the defendant were done under the act of October 10, 1868, and not otherwise, and under these circumstances the defendant being once before tried and acquitted, on an indictment, the same in terms as the present indictment, the offense in both instances being for setting up or carrying on a lottery without legislative authority, by the same defendant and under the same plea and facts in evidence, the Supreme Court of the State, upon an appeal from the judgment of this court on said former trial, having ordered the defendant to be discharged from further prosecution, the defendant is not now, under the law, subject to punishment under the circumstances, and must be found not guilty."

2d. "The sum of two thousand dollars paid into the treasury of the State, by the defendant, under the act of October 10, 1868, on the first day of November, 1874, and that act having been passed upon and construed by the Supreme Court of the State, and adjudged to be not repealed or altered by the subsequent act of the 8th day of March, 1871, and the payment into the State treasury of the sum required by the act of 10th of October, 1868, is an estoppel of the State from a criminal prosecution for the time covered by such payment, and such payment being admitted in this case to be made by the defendant as the

representative of Boyd, Jackson & Co., for the year during which the indictment in this case was found, the State is thereby estopped from prosecuting the defendant under this indictment, and you should find defendant not guilty."

3. "Intent to violate law, is a necessary ingredient to constitute crime, and so long as the defendant has an act of the legislature of the State giving him authority to do a specific thing, while that act remains unrepealed and unimpeached by competent judicial decision, no one having authority under such an act, can be held to intend a violation of law for doing the things authorized thereby—the legal presumption is in favor of the legality of an act of the legislature, and while the same legal presumption would be in favor of a repealing act, yet that presumption in favor of the repealing act, is removed as soon as the validity of such repealing act is called in question and decided by the Supreme Court not to be operative or of any force; such a decision would restore the presumption in favor of the original act sought to be repealed, and intention to commit a crime can not be drawn from the mere commission of an act so authorized.

4. "Upon the facts as the same are admitted in this case by both parties, the defendant is entitled to a verdict of not guilty.

5. "The act approved October 10, 1868, gives the persons named therein, and their associates as partners, the right to distribute books, paintings, works of art, scientific instruments and apparatus, lands and tenements, stock and currency, and such other valuables as shall promote the object of the said partnership, " by awards and prizes, and by this grant said parties may so distribute one or any number of the things named, but need not distribute all of them, unless they see proper to do so."

Each of these charges, thus requested, was refused, and to each of which refusals the defendant excepted.

The jury found the defendant guilty, in manner and

form as charged in the indictment, and assessed the fine at one thousand dollars, and upon this verdict judgment was rendered.

The defendant appealed to the December term, 1875, of the Supreme Court of Alabama, and in that court assigned as error the charge given and each refusal to charge as requested, and on the 24th day of March, 1876, the Supreme Court of the State affirmed the judgment of the court below. The Chief Justice dissented. The opinion of the court and the dissenting opinion are made parts of the record.

ASSIGNMENT OF ERRORS.

WILLIAM W. BOYD, JR. *vs.* THE STATE OF ALABAMA. } *Supreme Court of United States, October Term, 1876.*

Now at this term comes the said William W. Boyd, Jr., by his attorney, Samuel F. Rice, and says that in the record and proceedings aforesaid, there is manifest error, in this, to-wit:

1st. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Mobile.

2d. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Mobile, after said Supreme Court of Alabama had in a prior case between said Wm. W. Boyd, Jr., and the State of Alabama, involving the same right asserted and relied on in the present case, by said Boyd to carry on a lottery, decided that the same act of the Legislature under which he claimed authority so to do, was a valid legislative act, and a binding contract on the State of Alabama.

3d. The Supreme Court of Alabama erred in not reversing the judgment of said City Court of Mobile.

4th. The Supreme Court of Alabama erred in deciding that the act of the Legislature under which said Boyd in

the present case claimed legislative authority for setting up and carrying on a lottery, was unconstitutional and void.

5th. The Supreme Court of Alabama erred in holding that there was no error in the refusal of the City Court of Mobile to give the following charge moved for, in writing, by said Boyd, to-wit: "Upon the facts as same are admitted in this case by both parties, the defendant [said Boyd] is entitled to a verdict of not guilty."

6th. The Supreme Court of Alabama erred in holding that there was no reversible error in the charge given by said City Court of Mobile, which charge is as follows, to-wit: "Upon the agreed statement of facts and the evidence in this cause, the defendant [said Boyd] is guilty in manner and form, as charged in the indictment."

7th. The Supreme Court of Alabama erred in deciding and holding that the said City Court of Mobile, committed no error in refusing the charge moved for by said Boyd in writing, which charge is as follows: "The facts being admitted, that the defendant in this case has been heretofore and before the finding of this indictment, arraigned, tried and acquitted in this Court upon an indictment for setting up and carrying on a lottery, without the legislative authority of this State, and that the defense under that indictment was the act of 10th of October, 1868, under which defendant claimed he had legislative authority to set up and carry on a lottery, notwithstanding the subsequent act of the Legislature, approved 8th day of March, 1871, which was intended to repeal said first act of October 10th, 1868, and it being further admitted that under and in accordance with said last mentioned act, the defendant has fully paid into the treasury of the State, the sum of two thousand dollars, and that all the acts done by defendant, were done under the act of October 10th, 1868, and not otherwise, and under these circum-

stances the defendant being once before tried and acquittd on an indictment the same in terms as the present indictment, the offense in both instances being for setting up or carrying on a lottery without the legislative authority, by the same defendant' and under the same plea and facts in evidence, the Supreme Court of the State upon an appeal from the judgment of this Court on said former trial, having ordered the defendant to be discharged from further prosecution—the defendant is not now, under the law subject to punishment under the circumstances, and must be found not guilty."

8th. The Supreme Court of Alabama erred in holding and deciding that the said City Court of Mobile committed no error, in refusing the following charge moved for in writing by said Boyd, to-wit : "The sum of two thousand dollars being paid into the treasury of the State by the defendant, under the act of the 10th of October, 1868, on the first day of November, 1874, and that act having been passed upon and construed by the Supreme Court of the State, and adjudged to be not repealed or altered by the subsequent act of the 8th of March, 1871, and the payment into the State's treasury of the sum required by the act of October 10th, 1868, is an estoppel of the State from a criminal prosecution for the time covered by such payment, and such payment being admitted in this case to be made by the defendant, as the representative of Boyd, Jackson & Co., for the year during which the indictment in this case was found, the State is thereby estopped from prosecuting the defendant under this indictment, and you should find him not guilty."

9th. The Supreme Court of Alabama erred in holding and deciding that said City Court of Mobile committed no error, in refusing the following charge moved for in writing by the defendant Boyd, [the plaintiff in error] to-wit : "Intent to violate the law is a necessary ingredient to constitute a crime, and so long as the defendant has an

act of the Legislature of the State, giving him authority to do a specific thing, while that act remains unrepealed, and unimpeached by competent judicial decisions, no one having authority under such an act can be held to intend a violation of law for doing the things authorized thereby —the legal presumption is in favor of the legality of an act of the Legislature, and while the same legal presumption would be in favor of a repealing act, yet that presumption in favor of the repealing act is removed, as soon as the validity of such repealing act is called in question and decided by the Supreme Court not to be operative or of any force : such a decision would restore the presumption in favor of the original act sought to be repealed, and intention to commit crime cannot be drawn from the mere commission of an act so authorized."

10th. The Supreme Court of Alabama erred in holding and deciding that there was no error in the refusal of said City Court of Mobile, to give the following charge moved for in writing in the said City Court of Mobile, by the plaintiff in error, to-wit : "The act approved October 10th, 1868, gives the persons named therein, and their associates as partners, the right to distribute books, paintings, works of art, scientific instruments and apparatus, lands and tenements, stock and currency and such other valuables, as shall promote the object of the said partnership ; by awards and prizes, and by this grant said parties may so distribute one or any number of the things named, but need not distribute all of them, unless they see proper to do so."

11th. The Supreme Court of Alabama erred in denying validity to the act of October 10th, 1868, which gives the plaintiff in error the right to do the thing or things for which he was indicted.

12th. The Supreme Court of Alabama erred in reversing and departing from its former decisions on the said act of October 10th, 1868, which after said decisions, if

not before, became a binding contract protected by the Constitution of the United States, from impairment, either by repeal or change of judicial decision.

13th. The Supreme Court of Alabama erred in rendering its final judgment.

14th. The Supreme Court of Alabama erred in denying the right asserted and relied on by plaintiff in error as a right which grew out of or was protected by the said act of October 10th, 1868, and the acceptance of the provisions thereof by the said payments thereunder, and by the said decision or decisions of said Supreme Court of Alabama made prior to the commencement of the present case, and by paragraph 1 of Section X of Article 1, of the Constitution of the United States.

And the said William W. Boyd, Jr., prays that said final judgment of said Supreme Court of Alabama, affirming the judgment of said City Court of Mobile, may be reversed, annulled, and altogether held for naught, and that he may be restored to all things he hath lost by occasion of said judgment.

SAMUEL F. RICE,
Attorney for Plaintiff in Error.

ARGUMENT.

The points insisted on by plaintiff in error, are the following:

1. The act of October 10, 1868, (hereinabove referred to and hereinafter set forth,) amounted to a proposition on the part of the State of Alabama, which, when accepted by the individuals or partners therein mentioned, became a binding contract.

Cooley's Const. Lim., 3d ed., top page, 284.
McGee v. Mathis, 4 Wallace, 143.
Hawthorne v. Calef, 2 Wallace, 10.
Davis v. Gray, 16 Wallace, 232.

2. Payment by these individuals, in pursuance of that act, of the first annual amount required by its provisions, within less than thirty days after its passage, constituted a complete acceptance of its provisions; and upon such payment, the act became a binding contract.

Manaway v. The State, 44 Ala. Rep. 375.

3. If such payment of said first annual amount, did not, *per se*, amount to a complete acceptance of the provisions of said act, certainly, such payment of that amount, coupled with the regular and timely payment and tender of each subsequent annual amount contemplated by the act, constituted such complete acceptance.

4. If the contract, consisting merely of said act and of the acceptance of its provisions by the timely payments of the prescribed annual amounts in pursuance thereof,—did not become a binding contract prior to the time, when "by the laws of the State *as then expounded* by all departments of the (State) government, and administered in its courts of justice," it was treated and enforced and held as a contract valid "*when made*," and of continuing validity,—it became, from that time, a binding contract, and "its validity and obligation can not be impaired by any subsequent action of legislation, *or decisions of its courts* altering the construction of the law."

Gelpcke v. City of Dubuque, 1 Wallace, 206.

Olcott v. The Supervisors, 16 Wallace, 690.

5. The contract set up in this case by the plaintiff in error, having been adjudged valid by the Supreme Court of Alabama at its Jan. term 1874, in a case between the identical parties to the present suit, in which the question of its validity (the validity of this same contract) was broadly

open and necessarily involved, and every annual amount prescribed in said act of October 10, 1868, having been duly and in due time paid or tendered by the individuals therein mentioned, and one of these annual amounts having been actually received by the proper officer of the State after said last mentioned adjudication, and for the very period embraced by the subsequent indictment found in the present case, could not be impaired in validity and obligation, by any subsequent decision of the Supreme Court of the State.

Gelpcke v. City of Dubuque, 1 Wallace, 206, and authorities cited in this brief.

6. The right set up and relied on by the plaintiff in error in this case, in the State courts, grows out of, and is part and parcel of, or "a fruit" of a legislative contract, the terms of which are shown in said act of October 10, 1868; that right is protected and sanctioned by the Constitution of the United States, to-wit: by paragraph 1 of section X, of Article 1, of that constitution, "*against all the laws and decisions*" of the State of Alabama, but has been denied by the highest court of that State in its judgment of affirmance in the present case.

Owings v. Norwood's Lessee, 5 Cranch, 345.

Re-affirmed in Long v. Converse et al., 1 Otto, (91 U. S. Rep. S. C.) 113.

Butz v. City of Muscatine, 8 Wallace, 582–584.

Township of Pine Grove v. Talcott, 19 Wallace, 677–78.

7. The judgment of the Supreme Court of Alabama affirming the conviction of the plaintiff in error and making (as it does make) the change of judicial decision as to the validity of the said act of October 10, 1868, is, under

the established facts of this case, equivalent in effect to the simultaneous enactment and enforcement of an *ex post facto* law.

Cooley's Const. Lim., 3d ed., top page 266, and notes 1 and 2.

Olcott v. The Supervisors, 16 Wallace, 690.

Revised Code of Alabama, § 3955.

8. Whether or not the said act of October 10, 1868, became a binding contract within the protection of the Constitution of the United States, upon the acceptance of the provisions of said act and upon the other established facts of this case, is a question to be decided by the Supreme Court of the United States independently of the adjudication by the Supreme Court of Alabama in the present case, to the effect, that said act is in conflict with the Constitution of that State and therefore void.

Jefferson Branch Bank v. Skelly, 1 Black, 436.

Bridge Proprietors v. Hoboken Co., 1 Wallace, 116.

McGee v. Mathis, 4 Wallace, 143.

Hawthorne v. Calef, 2 Wallace, 10.

Olcott v. The Supervisors, 16 Wallace, 690.

Furman v. Nichol, 8 Wallace, 44, 56.

Town of Venice v. Murdock, 2 Otto, 501.

In determining such questions, it is proper to remember that the rule, that where the entire purpose of a charter or grant is to confer *bounties* on corporations or individuals, the construction of any provision thereof about which there is doubt must be in favor of the government, does not extend to charters or grants in which there are stipulations for services, or pecuniary payments by the grantee.

Charles River Bridge v. Warren Bridge, 11 Peters, 420.

Ohio L. & T. Co. v. Debolt, 16 How., 435.
Dubuque & P. R. Co. v. Litchfield, 23 How. 88.
Home of the Friendless v. Rouse, 8 Wallace, 437.
State Bank of Ohio v. Knoop, 16 How. 369.

9. The Supreme Court of Alabama (under the admitted facts) in the judgment rendered by it necessarily decided, and could not possibly avoid deciding, that the act of October 10th, 1868, was not a contract between plaintiff in error and the State ; that it conferred no rights whatever upon him, and that all the title, rights, privileges, and immunities claimed by the plaintiff in error under it and under the National Constitution protecting it were without foundation, and must be denied.

It is plain from the record that the plaintiff in error, did claim under the Constitution of the United States, a title, right, privilege or immunity, and that the decision of the Supreme Court of the State of Alabama was against the title, right, privilege, or immunity so set up, or claimed. He claimed that the Constitution of the United States protected the legislative contract above mentioned, from impairment or repeal, and shielded him personally from criminal punishment, by any subsequent or *ex post facto* law or decision, for acts done under his said contract, after the highest court of the State had adjudged it to be a valid contract.

The jurisdiction of this Court seems too clear for dispute.—*Furman vs. Nichol*, 8 Wallace, 44 ; *Bridge Proprietors vs. Hoboken Co.*, 1 Wallace, 116 ; *Murdoch vs. City of Memphis*, 20 Wallace, 590, and other cases above cited.

It is clear that a Federal question was raised and was decided against the plaintiff in error ; therefore the jurisdiction of this Court attaches, *and the case must be heard on*

its merits ; Rail Road Company *vs.* Maryland, 20 Wallace, 643.

10. The jurisdiction of this Court cannot be evaded or eluded by failure of the State Court to show *expressly*, that it did decide a Federal question against the plaintiff in error, or by any ingenuity or contrivance, if upon a fair construction of the entire proceedings, it appears that such Federal question was in the case, and was necessarily involved and decided by the judgment rendered, and decided against the plaintiff in error. See cases above cited.

The said act of October 10th, 1868, is as follows :

AN ACT

To establish a mutual aid association, and to raise funds for the common school system of Alabama.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That William W. Boyd, Charles D. Jackson and George W. Parrott, and their associates as partners, shall have the right and full authority to form themselves into a partnership association for the distribution of books, paintings, works of art, scientific instruments and apparatus, lands and tenements, stock and currency, and such other valuables as shall promote the object of the said partnership association, to be distributed by awards and prizes, under such rules and regulations as they may adopt, and in such place or places in this State as they may select.

SEC. 2. *Be it further enacted*, That the said parties shall have power to receive subscriptions and to sell certificates of subscription, which shall entitle the holders thereof to such articles as may be awarded to them, or their equivalent in currency; and such distributions shall be made in public, after due advertisement, by the casting of lots, or by lots, chance or otherwise, according to rules and regulations to be established by them.

SEC. 3. *Be it further enacted*, That before any distribution is made, a list of the articles to be distributed shall be advertised, with the value of each article annexed ; and the said parties shall have the right, and it is hereby made their

duty to offer premiums and prizes to the citizens of Alabama, for the best essays in science and art, and the most deserving works of art, and the most useful inventions in the mechanical sciences.

SEC. 4. *Be it further enacted*, That before commencing business under the provisions of this act, the said parties shall deposit in the treasury of the State, to the credit of the school fund and for educational purposes, and annually thereafter, the sum of two thousand (2,000) dollars, for the term of twenty years, or so long as they may do business under the provisions of this act within said period, during which time the business aforesaid shall be exempt from taxation, except for State purposes.

SEC. 5. *Be it further enacted*, That the privileges herein granted shall continue for the term of twenty years, and that all laws contravening the provisions of this act be, and the same are hereby repealed.

Approved, October 10, 1868.

The act of March 8th, 1871, is as follows :

AN ACT

To repeal an act entitled "An act to establish a Mutual Aid Association, and to raise funds for the common school system of Alabama."

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That an act entitled "An act to establish a Mutual Aid Association, and to raise funds for the common school system of Alabama," approved October 10, 1868, be, and the same is hereby repealed.

Approved March 8, 1871.

The section of the Revised Code of Alabama under which the indictments referred to in the record were found, was adopted long before the passage of the said act of October 10th, 1868, and is as follows :

§ 3616. (74) *Lotteries.*—Any person who sets up, carries on, or is concerned in setting up or carrying on, any lottery or device of the like kind, without the legislative authority of this State ; or who sells or is interested or concerned in selling any tickets or shares in such unauthorized lot-

tery, must on conviction be fined not less than one hundred nor more than two thousand dollars.

Section 4314 of the Revised Code of Alabama is contained in the chapter, under the provisions of which the case of the plaintiff in error was taken to the Supreme Court of Alabama, and is as follows:

§ 4314. *Assignment of error or joinder unnecessary.*—In cases taken to the Supreme Court under the provisions of this chapter, no assignment of errors, nor joinder in error, is necessary; but the court must render such judgment on the record as the law demands.

Section 3955 of the Revised Code of Alabama, which has been the law of Alabama since the 30th day of November, 1866, provides that "No penal law shall take effect against any person in this State, until thirty days after the adjournment of the session of the Legislature at which such act may be passed."

At the June term, 1869, of the Supreme Court of Alabama, the constitutionality of the act of October 10, 1868, first came under discussion. That court declined then to pass upon the question; but treated that act as "a legislative license, or authority, within the purview and meaning of section 3616 of the Revised Code of Alabama."

Brent v. The State, 43 Ala. Rep. 297.

Two years afterwards, at its June term, 1871, the same act again came before the same tribunal, and one of the questions was, had it been repealed by the act of March 8, 1871? The court said: "The repeal of the act of October 10, 1868, could not impair this right. [The right to carry on a lottery.] It was the fruit of a contract, a vested right, which the State could not take away. It was fenced about and protected by the highest principles of justice, and by the supreme law."

Boyd & Jackson v. The State, 46 Ala. Rep. 333.

Nearly three years afterwards, this same act of October, 1868, was again the subject of judicial scrutiny and decision. The present plaintiff in error having been indicted and convicted in 1873 for carrying on a lottery, appealed to the State Supreme Court. That court, speaking of this same act, said: "It is most obvious that the words used in this grant are apt words to indicate a contract between the State and the grantees, touching a right conferred, upon a specific sum of money paid annually for a definite period of time. These are all elements of a contract, * * *. These characteristics * * clothe the act with the attributes of a contract, and protect it from repeal."

Boyd v. The State, at Jan. term, 1874; opinion set out in the record.

Yet, after these solemn judgments, the question having been three times before the court in the space of five years, it is said that nothing has been settled or determined; and two years later the same court so decides, obliterates its former decisions, destroys a contract, and inflicts punishment for acts done under a statute declared to be valid (and of course constitutional), and to authorize such particular acts—acts which, when done, were free from criminality, and adjudged to be lawful by all the tests known to civilized jurisprudence.

The record shows that on the trial of the present case in the city court of Mobile, it was expressly admitted by the State, that the acts of the plaintiff in error, charged in the indictment to constitute the crime in this case, were done under and according to the license of the said act of October 10, 1868, "and would be legal if said original grant is not unconstitutional, and if the original grant in the act of October 10, 1868, is not repealed by the subsequent act of the legislature of the State of Alabama, passed the 8th day of March, 1871, and found in the published acts of 1871, page 217."

A decision in favor of the State and against the plaintiff in error, after this distinct admission by the State, is certainly and obviously a decision, either that the act of October 10, 1868, is unconstitutional and void, or that the subsequent act of March 8, 1871, was a valid repeal of it.

Conceding that the State as well as the United States may claim immunity from *being sued*, yet when the State or the United States becomes *a plaintiff* in a suit, whether in form civil or criminal, it can claim no exemption in that suit from the settled rule as to *the conclusiveness of a former judgment*, or the settled rule as to the force and effect of *an admission made by a party to a suit on the trial of the suit*.

The United States v. Bank of Metropolis, 15 Peters, 377, and other cases cited in Brightley's Federal Digest, pages 842-843.

Davis v. Gray, 16 Wallace, 232.

Curran v. Arkansas, 15 Howard, 308.

City

That admission was made by the State at the June term 1875 of said court. Long before that time, the question of the constitutionality of the act of 1868, and the question whether it had been repealed by the act of March 8, 1871, had been conclusively settled against the State and in favor of the plaintiff in error, as above shown, and were not open for further controversy between the parties to this record.

Nothing *against the validity* of said act of October 10, 1868, is shown in the present case, that was *not in existence* when each of said three former cases was decided, and *available and open* to the State then, if ever available to it. The unconstitutionality of the act, which is now alleged (to-wit: alleged defectiveness of its title), if in existence *now*, was equally *in existence then*. If the State failed to urge such unconstitutionality *then*, its neglect deprives it of the right to urge it now. "*The party* against whom a

judgment has been rendered, cannot get rid of its effect as an estoppel, by the allegation of his own neglect, since, in the language of Chancellor Kent, it is a sound and salutary principle, that every person is bound to take care of his own rights and vindicate them *in due season.*—Birckhead vs. Brown, 5 Sanford's Rep. 145, 147; cases cited on page 147, Le Guen vs. Gouveneur & Kemble, 1 Johns. Cases, 502; Miller vs. Mernice, 6 Hill, 122; Cooley's Const. Lim. 3d edition, top pages 47, 51, and 53.

A former judgment, which is clearly erroneous *in law*, until reversed, "binds *the parties* as an estoppel upon every question which it in fact decided, and precludes them from denying, *in any subsequent action*, either *the facts* or THE LAW, upon which *it proceeded.*"—Birckhead vs. Brown, 5 Sanford's Rep. 151; Beloit vs. Morgan, 7 Wallace, 621 to 623, and cases there cited; Gould vs. Evansville & Craw. R. R. Co., 1 Otto, 526; Cooley's Const. Lim. 47 to 51; Rakes vs. Pope, 7 Ala. R. 161; Tarleton & Pollard vs. Johnson, 25 Ala. Rep. 300; the State of Missouri vs. Miller, 50 Missouri R. 129.

"There is an important distinction between those cases in which a judgment operates as *a bar* to a future suit for *the same thing*, and those in which it operates as *an estoppel;* in the first class, *the judgment itself* raises the bar; in the second, it is *the matter alleged by the party*, and upon which *the judgment proceeded*, that creates *the* estoppel."—Outram vs. Morewood, 3 East, 346; Birckhead vs. Brown, 5 Sandford, R. 142; and other cases above cited.

The conclusiveness of a former judgment either as a bar or as an estoppel, is, in no manner, dependent *on the*

form of the action (except perhaps in ejectment or the like); nor on the fact, that the former judgment was rendered in an action which, *in form*, was *criminal*. No matter what may be *the form* of the action, the settled rule is, "That as between parties and privies a judgment is conclusive" (either as *a bar* or as *an estoppel*) "as to every question upon which the right of the plaintiff to recover, *or the validity of a defence in another suit*, is found *to depend*, and upon the determination of which it appears from the record, *or is shown by extrinsic proof*, that the judgment was, in reality, founded."—5 Sandf. R. 145; and other cases above cited.

In *civil* cases the rule as to the conclusiveness of a former judgment, rests upon "reasons of public policy," such as are embodied in the maxim, "*Interest reipublice ut sit finis litium.*" In criminal cases, the rule rests *more strongly* on the very same public policy and reasons, and upon the vigorous adherence to the maxim, "*Nemo bis vexari debet, pro eadem causa.*"—5 Sandf. R. 140, and other cases cited above; Freeman on Judgments, sections 284, 284*a* and notes.

"The position, that in order to raise *an estoppel* by a prior judgment, the cause of action in the second suit, must, *in all respects*, be *the same*, as in the first," may not be absolutely novel, but is "repugnant to the reasons of public policy" above referred to, as well as to the highest and best (if not to all) authorities.—5 Sandf. R. 140, and other cases cited, *supra*; especially to Rakes vs. Pope, 7 Ala. R. 161.

The authorities cited completely establish the position, that the conclusiveness of a former judgment (either as a

bar or as an estoppel), cannot be impaired by bringing forward in a second suit, either matter of *fact* or matter of *law*, which *existed and might have been brought forward* in the former suit, but was not then brought forward. This is especially true, where in the first suit, the existence and validity of the contract, are determined, and in the second suit between the same parties, the complaint is, that there has been a subsequent exercise of a right growing out of the same contract and necessarily determined to exist, by the judgment in the first suit.—Rakes vs. Pope, 7 Ala. Rep. 161, and cases therein cited ; Birckhead vs. Brown, and the State of Missouri vs. Miller, *supra*.

When the State has been *the plaintiff* in a former suit, *in form* criminal, and has been overthrown by the judgment of *its own highest court*, to the effect, that a particular act of *its own Legislature* was not invalid, but operated as *a complete defence* to the complaint of the State ; and afterwards, but *within the period* for which that act was to remain operative, the State brings a second suit against the same defendant, and therein makes a like complaint, which is completely answered by the same act of the Legislature, *unless* that act be held *unconstitutional and therefore invalid* in the second suit—not only every reason which would exist against any other plaintiff for holding the former judgment conclusive, exists against the State ; but there exists this other conclusive reason for holding the former judgment conclusive against the State, to-wit :

"Every law of the legislature, *however repugnant to the constitution*, has not only the appearance and semblance of authority, but the force of law. It can not be questioned at the bar of *private* judgment, and, if thought unconstitutional, resisted ; but must be received and obeyed as, to all intents and purposes, law, until questioned in and set aside *by the courts*."

form of the action (except perhaps in ejectment or the like); nor on the fact, that the former judgment was rendered in an action which, *in form*, was *criminal*. No matter what may be *the form* of the action, the settled rule is, "That as between parties and privies a judgment is conclusive" (either as *a bar* or as *an estoppel*) "as to every question upon which the right of the plaintiff to recover, *or the validity of a defence in another suit*, is found *to depend*, and upon the determination of which it appears from the record, *or is shown by extrinsic proof*, that the judgment was, in reality, founded."—5 Sandf. R. 145; and other cases above cited.

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The State v. Carroll, 38 Conn. Rep. 472, cited and approved in The State of Missouri v. Douglas, 50 Missouri Rep. 596–7.

Lyon v. Richmond, 2 Johns. Ch. R. 51, and the approval of that case by Judge Story in note 1 to section 126, of 1 Story's Eq. Jur. (12th edition.)

The Propeller Gennessee Chief v. Fitzhugh, 12 How. 453.

The case of the plaintiff in error is yet stronger. The highest court of his State had three times held the very act of its legislature valid and a complete defence for exercising *the very right* under that act, for the *subsequent exercise of which* he is here held a criminal.

Although *the form* of the proceeding is criminal, yet it is clear from the record, that it is the *contract* right of the plaintiff in error, under his acceptance of the provisions of said act of the legislature, which, although previously thrice determined in his favor by this court, is *now again sought to be destroyed*,—and destroyed with heavy pecuniary fine superadded, to be paid, if not in money, by *imprisonment* of him as a criminal.

When, upon such facts as are shown in this case, such a judgment of the highest court of a State, as that of the Supreme Court of Alabama, is brought before this court on writ of error, this court will certainly reverse it.

Delmas v. Insurance Company, 14 Wallace, 661.

Hart v. White, 13 Wallace, 646.

Twitchell v. The Commonwealth, 7 Wallace, 321.

Cooley's Const. Lim. 126.

SAMUEL F. RICE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

W. W. BOYD, Jr.,
vs.
THE STATE OF ALABAMA. } No. 682.

BRIEF OF SAMUEL F. RICE, ATTORNEY OF PLAINTIFF IN ERROR, IN CONCLUSION.

Whatever is *clearly implied* in a constitution, statute, or decision is as much a part thereof as if it had been *fully expressed therein.*

The constitutionality of the act of 1868 was *necessarily implied* in the decision made by the State Supreme Court in 1874, in the former case between the same parties, that the act of 1868 was valid, had the *force of a contract*, and was incapable of repeal. (See the opinion in the record.)

That decision is as conclusive between these parties, as to the constitutionality of that act, as if it had *expressly* asserted its constitutionality. Unless that be so, the State of Alabama is wholly exempt from the settled rule as to the conclusiveness of a former judgment, and also from another sound and true rule, which is declared in 1 Wallace, 206, and in 16 Wallace, 690.

The State has no exemption from either of these rules. On the contrary, every reason for applying them to a private individual exists in equal or greater force for applying them to the State, especially in a criminal case. (See authorities cited in principal brief.)

The concession that laches is not imputed to the State, and that time does not operate against it, is of no avail to the State when it demands exemption from either of the settled rules above referred to, each of which is a different and distinct thing from the doctrine of laches or lapse of time, rests upon different and higher considerations, and is an effectual safeguard for a citizen who has contracted with the State against the oppression and ruin which might otherwise be

brought upon him if the State persisted in litigation regardless alike of legislative contracts and of judicial decisions.

(See pages 22–24 of principal brief, and especially cases cited in "Rakes *vs.* Pope," 7 Ala. R. 161.)

By the act of 1868 the legislature of the State asserted its authority to obtain money for its public schools from Boyd, Jackson, and their associates by a contract with them, the terms of which are shown in that act. The governor of the State approved the act. Boyd, Jackson, and their associates gave credit to this assertion of authority, and thereupon advanced their money in good faith. Afterwards, this authority was drawn in question, and the highest court of the State, in a case between the parties to the present suit, deliberately decided that the legislative authority existed—that the act of 1868 amounted to a contract, and could not be repealed. Boyd, Jackson, and their associates thereupon advanced more of their money in good faith, giving credit to the assertion by all departments of the State government that the act of 1868 was valid and not repealable. After this last decision and payment, and during the period covered by it, the plaintiff in error *exercised* the right and authority clearly given by the act of 1868; and for this *exercise* of *the same right*, which had been settled in his favor by the highest State court in 1874, the State, without offering to return any of the money obtained by it as above shown, indicted and condemned him, as shown in the record, not upon any new fact or ground, but upon a ground which, if ever in existence, was in existence from the approval of the act, to wit: that the act of 1868 is in conflict with section 2 of article 4 of the State constitution of 1868, which provides that "each law shall contain but one subject, which shall be clearly expressed in its title." And the highest State court, professedly upon this ground, held the former decision between these very parties as not conclusive, and affirmed the conviction of plaintiff in error.

Clearly, this change of judicial decision, this judicial "oscillation," denied the right set up and claimed as a defence, and set up and claimed as a right growing out of a legisla-

tive contract, and protected by paragraph 1, of section X, of Art. 1 of the Federal Constitution as fully *against any such change of judicial decision*, as against subsequent legislative repeal or impairment. (See authorities cited in principal brief, page 13, *et seq.*)

The State is clearly concluded and estopped as to the plaintiff in error, by the former decision of its highest court.

If there was no such estoppel, and if the validity of the act of 1868 was not touched by judicial decision, but was broadly open, then, according to the law of the land, that act was valid and became a contract as soon as its provisions were accepted by payments made thereunder. It is not in conflict with said section 2, of Article 4 of the State Constitution. That section applies to acts of the legislature which are to operate only as *laws*. It does dot apply to any act, the operation of which is not as *a mere law*, but as *a legislative contract*. Its words are, "each *law* shall contain but one subject," &c. A *law* is a rule of action, and clearly distinguishable from a contract. Although a law may be so framed as to be a contract, yet it may be so framed as to amount to nothing, except as a contract. That is the character of the act of 1868.

The legislative power includes the power to make contracts, as well as to pass laws. There may be a constitutional limitation as to passing laws, which does not touch the power to make contracts. The State Constitution of 1868 contains no prohibition upon the power of the legislature to raise money by lottery or the like, to support the common school system of Alabama. This is clear from its 13th Article taken in connection with its 4th Article. The legislature may make contracts for such purpose, by resolution, or by other act than such as is termed "*law*," in section 2 of said Article 4. There is no reason for implying a prohibition upon the legislature as to making such contracts, when the words of the constitution find full operation as to those acts of the legislature which are mere *laws*, and not contracts or propositions for a contract

"Want of authority to make the contract" may be fatal

in cases where a mere "excess of authority" would not be, as where the legislature of the State asserted its authority to make the contract and the other party advanced his money in good faith, giving credit to the assertion. (Royal British Bank *vs.* Turquand, 5 Ell. and Black., 259; Same Case, 6 *ib.*, 331, St. Joseph Township, *vs.* Rogers, 16 Wallace, 666.)

The title of the act of 1868 is not objectionable, if construed according to the adjudged cases in Alabama. (*Ex parte*, Selma & Gulf R. R. Co., 45 Ala. R., 773; Falconer *vs.* Robinson, 46 *ib.*, 350; Gunter *vs.* Dale County, 44 *ib.* 639; Martin *vs.* Hewitt, 44 *ib.*, 418; Farley *et al. vs.* Dowe, 44 *ib.*, 325; *Ex parte*, Upshaw, 44 *ib.*, 234.) Surely that title cannot authorize the conclusion that the contract, the terms of which are set forth in the act, and in acceptance of which the State received money, is void by the State constitution of 1868!

The people constitute the State, elect the judges for six years, and the governor and members of the legislature for shorter terms. When this people as a State becomes a party to a contract, it cannot impair its obligation by any subsequent act of *its legislature*. But yet the Supreme Court of Alabama has, in this case, virtually decided that the State can destroy the obligation of the contract, by change of judicial decision in its highest court. It cannot be that under the Federal Constitution a contract of a State, often held valid by all its departments, becomes void, *ab initio*, whenever afterwards its highest court decides that it was unconstitutional.

In Worcester *vs.* The State of Georgia, 6 Peters, 541, this court held it to be its duty to "examine the defence set up by the accused;" did examine it, found it good, and thereupon reversed the judgment of the State court and rendered judgment discharging the accused.

SAMUEL F. RICE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

W. W. BOYD
vs.
STATE OF ALABAMA.

No. 682.

Brief on motion to affirm judgment.

The plaintiff in error was indicted June, 1875, for being concerned in "setting up and carrying on a lottery without the legislative authority of the State."

The bill of exceptions shows that it is admitted he was thus engaged within 12 months prior to the finding of the indictment.

The accused defended himself under the authority of the act 10 Oct., 1868, (Acts of 1868, p. 263). This is entitled—"AN ACT TO ESTABLISH A MUTUAL AID ASSOCIATION, AND TO RAISE FUNDS FOR THE COMMON SCHOOL SYSTEM OF ALABAMA."

Under charge of the Court the jury returned a verdict of guilty, and on appeal to the Supreme Court of the State, the judgment below was affirmed, and the case is now here on a writ of error.

It is admitted that the accused was protected by the act of 1868, if that act is constitutional and not repealed by the act of 1871.

It is also admitted, that the payments stipulated for in the act were regularly paid to the State to the 1st Nov., 1872; that the payment then due was tendered to the State but refused, on the ground that the act of 1868 had been repealed by the act of 8 March, 1871; that a like tender was made on 1st Nov., 1873, which was also refused; and that the tender on 1st Nov., 1874, was accepted and receipted for.

In the Supreme Court of the State the several provisions of the act of 1868 are commented on, and the opinion on this head thus concludes:

"These views of the act, and of the rights and powers it was intended to confer, leave it very questionable if we could affirm, that the statute invoked, even if there was no doubt as to its constitutionality, authorized the setting up of a lottory, as shown in this record."

The opinion then proceeds,—"But granting that this right is conferred in the body of the statute, *it is not expressed in the title.* Never was language employed less apt to convey to the mind, learned or unlearned, the idea that the partnership association, the Mutual Aid Society, was to be an undisguised lottery, and that the encouragement of letters, the promotion of science and the arts, which it proposed, was the uncertain prize in currency which might fall to the ticket holder."

Again it is said,—In the case of Moses & Beebe (in manuscript), the Court held that the "act to establish the Mobile Charitable Association, for the benefit of the common school fund, without distinction of color, "so far as it was supposed to authorize lotteries and games of chance, was unconstitutional because the subject was not clearly expressed in the title."

"No distinction (say the Court) can be drawn between that case and this. In fact, we consider the title of the

statute in this case less apt and more delusive than was the title to the act, which was construed, in that case. The reasoning there employed we consider unanswerable. Being fully satisfied that the case was correctly decided, we are compelled to hold the same feature in the present case unconstitutional."

Reference is then made to several prior decisions of the Court in which the act of 1868 was treated as constitutional, and adds,—"In those cases the constitutional question above discussed *was neither presented nor considered.*"

In conclusion, it is said Chief Justice Brickell agrees with us in holding, that the statute above referred to, so far as it is supposed to authorize a lottery, is *unconstitutional* for the reasons stated.

"He thinks, however, that in as much as the said statute had been pronounced valid by the court in the cases referred to by him, the defendant could not be properly convicted under this indictment."

"*We all agree that there is no constitutional statute authorizing the act of which defendant was convicted.* It would be an anomaly in the law if we were to hold that the defendant is guiltless, when there is no dispute that he violated the only constitutional statute on the subject."

The separate opinion of BRICKELL, C. J., is sent up with the record, and fully sustains what is said by the majority of the court.

The Chief Justice says: The general constitutional limitation that "*each law shall contain but one subject, which shall be clearly expressed in the title,*" is of the same force in the grant of authority, dispensing with the operation and affording immunity from a general penal statute, as in the enactment or repeal of such statute. *The General Assembly cannot disregard it in the one case or the other.*

I freely concur with the majority of the court that the act of the General Assembly, under which the appellant claims authority to set up and carry on a lottery, *is an infraction of the constitutional limitation*, and cannot therefore be deemed *legislative authority*."

"I am also inclined to the opinion, if the statute could be regarded as constitutional, *it was competent for the Legislature to repeal it by the act of March*, 1871."

But he adds: "I am nevertheless constrained to the conclusion that these questions have been finally adjudicated against the State and in favor of the appellant in the cases heretofore before the court.

A motion for rehearing was had at the instance of the accused, and the grounds stated by the Chief Justice were elaborately argued and considered by the court, and the judgment rendered was adhered to.

This full citation of the opinions is made that it may be seen clearly that they involve no question which this court has the power to review.

It is supposed that the act of 1868 constituted a contract for a definite period, and that this has been violated. This is the only Federal question raised.

The jurisdiction can only be invoked under the inhibition of the Federal Constitution. What is this?

No State shall pass any "*law impairing the obligation of contracts.*"

To bring this into operation, it must be first ascertained whether a contract existed, and then whether there is a law impairing its obligation.

The Supreme Court of the State has unanimously decided that the contract never existed. In other words, that the act which authorized it never had any constitutional validity.

A void act can neither afford authority or give protection to those who act under it.

If authority were needed to so self-evident a proposition, we may cite the language of the Chief Justice in the leading case of *Osborn* v. *Bank U. S.*, (9 Wheat., 738). "The counsel for appellants are too intelligent and have too much self respect to pretend that a void act *can afford any protection to the officers who execute it.*

The decision sought to be reviewed declares that the act of 1868 is itself void. The case does not present a "law impairing the obligation of contracts."

This decision of the State Court, upon the construction of the State Constitution, is final, not only on the State Courts, but equally conclusive on the Federal tribunals.

There being in the case no "law impairing the obligation of the contract, it can only be said that the *decision of the court* produces this consequence."

This assumes that there was a contract, and that the decision had ~~empowered~~ its obligation. But the contrary is the fact. The court has declared that no legal contract ever had an existence.

impaired

But if we were to admit that there existed a legal contract, the decision of the court affecting it could not be reviewed here.

There is no authority to review the judgments of State Courts, because they refuse to give effect to valid contracts, or because in their effect they impair the obligation of contracts. If the rule were otherwise (say the court) every case could be reviewed when the party seting up the contract alleged that the court had taken a different view of its obligation to that which he held. To confer the jurisdiction, it must be the *Constitution or*

statute of the State which impairs the obligation of the contract.

*Railroad Co.*v . *Rock*, 4 Wall., 181.
Railroad Co. v. *McClure*, 10 Wall., 511.
Bethel v. *Demoret*, 10 Wall., 538.
Knox v. *Exchange Bank*, 12 Wall., 379.

The majority of the court differ with the Chief Justice as to his construction of previous decisions in which the act of 1868 was involved. These cases, the majority say, never passed upon the constitutionality of the act. The question was not raised and the court proceeded on the assumption of its legality.

This is a matter of no consequence on the question of jurisdiction, except in this regard.

If at the time a contract under a statute is entered into the courts had decided the statute to be constitutional, and subsequent to the contract the statute should be declared to be unconstitutional, then, on writ of error to this court, the contract would be sustained, and the court would conform its action to those decisions which existed and on the faith of which the contract was entered into.

This proceeds on the well settled doctrine that the decision of the State Court construing State statutes, forms a part of the statute itself.

This is the doctrine first announced in *Rowan* v. *Russel*, 4 How., and followed in *Ohio Life Ins. Co.* v. *Debolt*, 16 How., 431, *Gelpyk* v. *Dubuque*, 1 Wall., 267, and other cases.

These cases have no application to the case in hand. When the contract under the act of 1868 was entered into, there was no decision maintaining the constitutionality of that act, on the faith of which the party relied

nor has there ever been such a decision as declared by the majority of the court.

These considerations are conclusive of the want of jurisdiction here, and the principles upon which this denial rests are so plain and have so often been declared by the decisions of the Court, as to justify the motion now made, under the amendment of the 6th rule, to affirm the judgment.

There can be no just cause of complaint on the part of the plaintiff, except that he has been convicted for an act which was apparently authorized by the Legislature. If he has acted in good faith he will not suffer, as the Legislature will doubtless remit any fine which may be imposed upon him. *The judiciary can afford no relief.*

JOHN T. MORGAN,
P. PHILLIPS,
for Defendant in Error.

14 *March*, 1877.

Supreme Court of the United States.

W. W. BOYD
vs.
STATE OF ALABAMA.

Brief of P. PHILLIPS,

For Defendant in Error in reply.

The only matter set up in the brief of Mr. Rice which needs be noticed is in his 5th point at page 12.

He there states the proposition, that as the court had in 1874, in a case between the same parties in which the validity of this contract was "*broadly open and necessarily involved*," adjudged it valid, and as the annual payment to the State was made subsequent to this adjudication, and this for the period embraced by the present endictment this contract "*could not be impaired* in its validity and obligation by any *subsequent decision* of the Supreme Court of the State."

We have already shown that the Supreme Court of the State holds that by *no decision had the act of* 1868 (on which the alleged contract depends) *ever been decided to be constitutional.*

The proposition seems to advance the idea that in the case decided in 1874, wherein it was held that the act of 1868 and the payment under it *constituted a contract*, the State was bound to make the defense that the act was unconstitutional, and having failed to do so, it is forever

estopped from asserting it in any subsequent prosecution. And so it is said at page 20, that—

"If the State failed to urge such unconstitutionality *then*, its *neglect* deprives it of the right to urge it *now*. The party against whom judgment has been rendered, *cannot get rid of its effect as an estoppel*, by the allegation of *his own neglect*."

And this is followed up by an exhaustive citation of authorities, illustrating the doctrine of *estoppel*. p. 21.

The decision relied on as an estoppel, was had on an indictment found in 1873, for carrying on a lottery without "legislative authority."

The indictment in the present case was found in 1875, for carrying on a lottery within 12 months prior to that time.

In both cases the State is plaintiff, and Boyd is defendant. The parties, it is true, are the same, but the *cause of action is not the same*, and so there would be no estoppel.

In the former decision of the State Court rendered on an *agreed state of facts*, the Court say, It is insisted on the part of the State, "that the act granting the authority *had been repealed*" *by the act* 8 *March*, 1871. The Record raises *but one question*. That is this, "was the act of 10 October, 1868, repealed by the act of 1871. Did the act of 1868 confer a vested right upon consideration sufficient to support a contract?"

Now, when the Supreme Court in the present case say, that the *constitutionality* of the act of 1868 was *not raised or decided*, the reply is, true. But the case was "broadly open" to such a question. It was *then* proper to make it. The failure to make it was a "*neglect*" on the part of the solicitor representing the State, and by this neglect the State is forever estopped from setting up this question as against this defendant.

This attempted application of the doctrine of estoppel to the sovereign finds no sanction in reason, and no authority in law.

From the presumption that the sovereign is wholly employed in public affairs, it is an established rule at common law, that *no laches can be imputed to him*, nor is he in any way to suffer in his interests, which are certain and permanent.

Hence "*vigilantibus, et non dormientibus jur a subvenient*" is a rule for the subject; but *nullum tempus* occurrit regi," is the sovereign's plea. For there is no reason that he should suffer by the *negligence of his officers, or by their compacts and combinations with the adverse party.*

8 Bac. Abr. Prerogative. E.

And so it is said by this court. "The general principle is, that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous, and scattered, that the utmost vigilance could not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions."

U. S. v. Kirkpatrick, 9 Wheat., 720

We repeat what we have said in former Brief—that on this writ of Error, the jurisdiction cannot be sustained, without showing, that the State has passed "a *law* impairing the obligation of the contract."

There is no such "law" in this record. The complaint is of a *decision*, and as to this there is no power of revision here.

And we again say, if the defendant, acting *bona fide*,

was induced by a decision of the Court to believe that he was authorized to continue his lottery, his appeal to the Executive, or legislature, to be relieved of his fine, would receive favorable consideration.

The judiciary, however, cannot grant relief, and we therefore fully concur in the language of the decision now sought to be reviewed. "*As we all agree, that there is no constitutional statute*, authorizing the act of which the defendant was convicted, it would be an anomaly in the law, if we were to hold that the defendant is guiltless, *when there is no dispute that he violated the only constitutional statute on the subject.*"

We have referred in former brief to cases where there has been a change of opinion in the State Court, in reference to the constitutionality of an act, and admitted, that contracts made when such decision was in favor of its validity would be upheld in this court though subsequent decisions of the State Court were against the validity of the act.

But it is to be observed, that this could only be on cases brought before the court by writ of error or appeal from a *Federal Court.*

No writ of error would lie to a State Court to reverse its decision, because in conflict with its former decisions on the faith of which, a contract had been entered into; and this, for the reason already stated, that to confer jurisdiction, effect must have been given by the State Court to a "*law*" impairing the obligation of the contract.

It is, then, very clear that the Federal question attempted to be presented is not entitled to serious consideration, and the judgment should be affirmed; or if the Court is satisfied that such question is not properly raised, the writ should be dismissed.

P. PHILLIPS,
for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 778.

ENOS LOWE AND WILLIAM A. LOWE

vs.

JESSE WILLIAMS.

Error to the Supreme Court of the State of Nebraska.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

Statement.

This suit was brought by defendants in error in the district court for the second judicial district of said State, where judgment was obtained against the plaintiffs in error. The case was taken on appeal by the plaintiffs in error to the Supreme Court of the State, where they filed a petition alleging that defendant in error was a citizen of the State of Iowa, and that plaintiffs were citizens of the State of Nebraska; that the amount in controversy exceeded the sum of five hundred dollars, and praying that said cause may be removed to the circuit court of the United States for the district of Nebraska; which petition was refused by said Supreme Court, and said court proceeded in the cause, and rendered final judgment against plaintiffs in error. The plaintiffs in error allege that the supreme court of Ne-

braska erred in refusing to allow said cause to be removed to the circuit court of the United States.

Argument.

The only point which this motion presents is, whether the question on which it is claimed the supreme court of Nebraska erred is a Federal question—not whether the court decided it correctly.

The plaintiffs in error, in their petition to said court, claimed a right and privilege under the act of March 3, 1875, session acts, p. 470, (quoted in defendant's supplemental brief,) which provides that "either party" may remove the suit to the circuit court of the United States when it is between "citizens of different States." The decision was against the right claimed under that act. There could not be a case more directly within the words of the judiciary act. And it is admitted by the counsel for the defendant, throughout both his briefs, to be a case involving the construction of an act of Congress, wherein the State court decided adversely to the right claimed under the act by the plaintiffs in error; and that their only reason for asking the dismissal of the case is that the State court decided correctly. This may be a good reason for affirming the judgment, but it does not touch the question of jurisdiction.

In the case of Kanouse *vs.* Martin, 14 H., p. 23, the court says: "The plaintiff in error claimed the right to remove the cause from the State court to the circuit court of the United States, under the 12th section of the judiciary act of 1789. The right claimed was denied by the State court, which retained the cause and proceeded to give final judgment against him. It is, therefore, precisely one of the cases enumerated in the 25th section of the judiciary act of 1789, in which jurisdiction is conferred on this court, and in which the judgment of the State court may be reviewed on writ of error, for the construction of an act of Congress was drawn in question, and the decision of the

court was against the right claimed under it by the plaintiff in error.

"*As to the authority of the supreme court of the city of New York to retain the case, and the validity or invalidity of its proceedings and judgments after the motion to remove, that question will stand for hearing when the case is reached in the regular call of the docket. But the motion to dismiss for want of jurisdiction, in this Court, is overruled.*"

There are many cases, including the recent case of the Railroad *vs.* Maryland, 20 Wall., 643, to the same effect.

The cases cited by defendant are not on motions to dismiss; thus Stevenson *vs.* Williams, 19 Wall., 575, so much relied on, was an affirmance of the decision below. It was also a case involving the construction of the act of 1867. The act of 1875, which this case brings before the Court, has not yet been construed here. At this stage of the case, the only question is, in the language used in Railroad *vs.* Maryland, whether "the record shows the existence of a decision which gives us jurisdiction." "The soundness of that decision" is reserved for a different stage of proceeding, and, according to the uniform practice of the Court, cannot be considered until the case is reached in its regular call on the docket, when defendant's argument on the "soundness of the decision" will be replied to.

MONTGOMERY BLAIR,
For Plaintiffs in Error.

4-630

778

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 778.

ENOS LOWE, AND WILLIAM W. LOWE, PLAINTIFFS IN ERROR.

vs.

JESSE WILLIAMS, DEFENDANT IN ERROR.

In Error to the Supreme Court of Nebraska.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR, ON MOTION OF DEFENDANT TO AFFIRM THE JUDGMENT.

1. The only question presented by this motion is, whether this writ of error is prosecuted in bad faith, merely for the purpose of delay. The motion implies a charge of unprofessional conduct against the counsel by whom the writ was advised, and is one which ought to be sustained only when the record admits of no doubt of the fact in any case, and certainly ought not to be favored when the most eminent counsel in the State of Nebraska, and a most upright and honorable gentleman, has advised it.

2. It is only when the record presents no question of law, or when the question raised has been adjudicated, that such a motion can be properly sustained. It is not enough that the Court should be of the opinion that the judgment should be affirmed. A large majority of the cases brought here are affirmed; and in many of them the judges arrive at their conclusions probably on the statement of the case. But, if defendants in error can, by this motion, cut off oral argument and precipitate the judgment, great injustice

may be done. Hence the Court must *restrict its action on such motions to cases presenting no question of law whatever, or questions which have been well settled by its adjudications.* In this case there arises a new and important question as to the construction of a statute not heretofore passed upon, either by this Court or by any of the judges at circuit.

The nature of this question appears from the argument for defendant. (See supplemental brief, pp. 2 and 3.) He contends that whilst it is true that "by the acts of 1866 and 1867, such applications (for a transfer of the case to the Federal court) could be made at any time before the final hearing or trial of the suit," "by the act of March 3, 1875, such application must be made before, or at the time at which, the said cause could be first tried, and before the trial thereof;" and as he alleges that this application was not so made, he insists it was properly refused. Is this true with respect to an application made in a case pending at the time of the passage of the act of 1875, and "made" (as the record shows) "at the term at which the cause could be first tried, and before any trial thereof," after the passage of said act? Prospective operation only will be given to an act unless the language expressly requires the contrary. Hence, this act applies only to "terms" and "trials" to occur after its passage and without regard to the courts in which they occur. Moreover, as the object is to give citizens the benefit of the Constitution this act will ~~best~~ be construed restrictively, ~~not~~ liberally.

But it is unnecessary, and it would not be proper, to argue the question upon this motion. It will be argued at the proper time by Judge Wakeley. For reply to the motion, it is enough to show that a question arises in the case, not yet settled by the court, and a question which does not admit of its being held that the prosecution of the writ of error to test it, is frivolous.

MONTGOMERY BLAIR.

April, 1877.